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No. ~~400~~ 1950

In the Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 9

BERNICE B. FERES, AS EXECUTRIX UNDER THE LAST
WILL AND TESTAMENT OF RUDOLPH J. FERES,
DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 558

BERNICE B. FERES, AS EXECUTRIX UNDER THE LAST
WILL AND TESTAMENT OF RUDOLPH J. FERES,
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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The court below has held that recovery may not be had under the Federal Tort Claims Act for the death of a member of the armed services whose death resulted from an injury incident to his service. In *Brooks v. United States*, 337 U. S. 49, this Court held that damages for injury to or death of a serviceman was recoverable under the Federal Tort Claims Act where that injury did not arise as an incident to the service; while it stated that where the injury or the death was service caused or connected "a wholly different case would be presented" it left that question open. The question of whether recovery can be had under the Federal Tort Claims Act for the

injury or death of a member of the armed services where the injury or death was incident to the services has given rise to divergent views in the lower Federal courts. In addition to the instant case, the same question has been answered in the negative by the court below in *Ostrander v. United States*, 178 F. 2d — (in which we are advised that a petition for a writ of certiorari will be filed), and by the Court of Appeals for the Fourth Circuit in *Jefferson v. United States*, 178 F. 2d 518 (in which a petition for a writ of certiorari has been filed, No. 381, Misc., this Term). The question has been decided in precisely the opposite manner by the Court of Appeals for the Tenth Circuit in *Griggs, Executrix, v. United States*, 178 F. 2d 1, in which case we propose to seek review. From these cases and many others which are pending in various United States district courts, it is apparent that the question is one of considerable importance.

While we regard the decision of the court below as correct, we believe that the conflict among the circuits and the importance of the question call for an authoritative decision by this Court. Consequently we do not oppose the granting of the petition.¹

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1950.

¹ Nor, as stated in a separate memorandum being submitted simultaneously herewith, do we oppose the granting of the petition in the *Jefferson* case, No. 381, Misc., this Term.